United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

Corrected Copy **SAM** DATE: April 29, 2005

TO : Alan B. Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bakery Workers Local 125
(Ghirardelli Chocolate Company) 554-1475-0137-4000
Case 32-CB-5867-1

The Region submitted this case for advice on whether the Union violated Section 8(b)(3) by refusing to bargain in good faith by failing to respond to certain questions submitted by the Employer in connection with a grievance filed by the Union.

We conclude that under extant Board law, the Union violated the Act. The questions are relevant to establish whether the Union would be controverting any of the Employer's stated reasons for denying the grievance and, if so, on what facts, witnesses, and documents the Union would be relying. We also find that by merely posing these questions in the format it did, the Employer was not engaging in unlawful pre-arbitral discovery, and the Union was required to substantively respond to the requested information.

FACTS

The Employer is engaged in the manufacture and distribution of chocolate goods at its facility in San Leandro, California. The Employer's production employees are represented by the Union. The parties' last full contract was effective for the period July 15, 2001 through July 10, 2004. That contract contained a union access provision, which reads as follows:

Section 25. VISIT TO ESTABLISHMENTS

> (a) Notice. The Business Representative of the Union shall have the right to visit the establishment of the Employer for the purpose of adjusting grievances which may arise under this Agreement and seeing that the terms and conditions of the Agreement are being fulfilled. The Business representative will notify the Employer upon arrival.

> (b) No Disruption. It is understood and agreed that the Business Representative will not interfere with or cause workers to neglect their work during plant visits.
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> (c) Also, it is understood that during such plant visits, Union Officials may be monitored by a member of management.
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> (d) In addition, if during the plant visit the need arises for the Union official to discuss any issues with a member, the Company, when possible, will have that individual removed from the line and provide a place where the official and individual may speak in private.

At the times material herein, the parties were in the process of negotiating a successor agreement to their 2001-2004 contract.

The dispute here stems from an incident that occurred at the Employer's San Leandro facility on September 8, 2004,[1] when three Union representatives made an unscheduled visit to the facility. Security personnel at the facility asked the Union representatives to wait while they sought instructions from the Employer's management concerning where to send the Union representatives. According to the Employer, the Union representatives ignored the security personnel's request that they wait and entered the facility without putting on any sanitary, safety or protective gear. The Union representatives then went to a production line and spoke to employees there, in the course of which they caused the production line to shut down. Employer representatives finally caught up with the Union representatives and escorted them out of the plant and into the reception area, where they allegedly became rude and yelled at reception personnel. On that same day, the Union filed a grievance against the Employer, alleging that the Employer violated Section 25 of the contract by "denying the rights of the business representative of the Union to visit the establishment."

The Employer responded by a letter dated September 10, which initially set forth the Employer's understanding of the September 8 incident and denied the grievance, because the Union had entered the plant without advance approval, without a monitor, and without donning the necessary safety and sanitary gear, all in violation of past practice. That letter went on to state that if the Union intended to pursue the grievance, then the Employer wanted responses to three

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[1] All dates refer to 2004 unless otherwise indicated.

questions. The Employer's September 10 letter asked the Union whether it contends that: (1) its representatives did not have any obligation to provide the Employer with advance notice of plant visits; (2) its representatives did not have any obligation to provide, upon request, information regarding the purpose of any plant visit; and (3) its representatives have no obligation to comply with the Employer's safety and sanitary requirements during any plant visit. The Employer's letter went to state that if the Union is making any of these contentions, to state the facts upon which the Union based any such contention; to identify all individuals with knowledge of facts related to any such contention; to identify any documents in the Union's possession that support any such contention; to provide a copy of any such document that supports any such contention; and, with respect to the safety and sanitary issue, to state all dates and times during the past three years when Union representatives entered the plant without being properly attired. According to the Employer's letter, it wanted such information so that it could "consider whether there is any factual basis for (it) to change its position" regarding the merits of the Union's grievance.

The parties held a bargaining session on September 14, during which they discussed the Union's grievance but did not specifically discuss the Employer's information request. However, the Employer concedes that the Union's representative made it clear at that meeting that the Union believed that it did not have to provide any advance notice of plant visits and also that it did not have to wait for any clearance from the Employer before it could enter the plant. Thus, in effect, the Employer received a response to the first question in its September 10 letter, albeit not in written form and not accompanied by supporting evidence.

On September 22, the Employer sent another letter to the Union, reiterating its September 10 information request. That September 22 letter requested a written response and made two additional information requests. Specifically, that second letter asked the Union whether it contends that: (1) its representatives are entitled, during the course of plant visits, to cause employees to stop work, and (2) the Employer is not entitled to maintain continuous visual contact with Union representatives during their plant visits. As with its initial request, the Employer sought supporting information from the Union if it was making any such contentions.

The Union's attorney responded to the Employer's September 10 letter by letter dated September 29 without providing any of the information requested in the Employer's

letters. The Union's attorney responded to the Employer's September 22 letter by letter dated October 15, again without providing any of the information the Employer requested. Rather, and with respect to the Employer's questions concerning what the Union's contentions were, the letter stated that the Union would be "happy to explore its views of the interpretation of the contract at the mediation."[2]

The Employer responded to the Union's October 15 letter with its own letter dated October 22. That letter repeated the Employer's prior information requests, including the underlying facts and documents relating to the Union's contentions made at the September 14 bargaining session that it did not have to provide advance notice of plant visits and that it could enter the plant without having to wait for clearance from the Employer to do so. The Employer's letter requested that the Union provide the information by October 23. The Union did not do so.

The parties nevertheless went ahead with the October 26 mediation session, at which the Employer asked the Union whether it had the requested information, and the Union representative said that she did not. The parties went on to discuss the Union's September 8 grievance. During the course of that discussion, the Union brought up at least one example of how a Union representative had entered the plant without checking in with either plant security or management. The Employer also has acknowledged being advised by the Union during the meeting that the Union is not contending that it need not comply with the Employer's sanitary and safety requirements (September 10th question 3) or that, during visits to the facility, the Union can cause bargaining unit members to stop performing their job duties (September 22nd question 1). Aside from those responses and the Union's earlier assertion at the September 14 bargaining session that it did not have to provide advance notice before visiting the Employer's facility, the Union has not responded in any way to the Employer's September 10 and 22 information requests. The Region has recently informed us that the underlying grievance has been appealed to arbitration.

ACTION

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[2] The parties had a mediation session on the Union's September 8 grievance scheduled for October 26. Under the parties' contractual grievance-arbitration procedure, mediation of a grievance before the Federal Mediation and Conciliation Service is available to the Union as the last step prior to arbitration.

The Region issue a complaint, absent settlement, alleging that under current Board law, the Union unlawfully failed to bargain in good faith by refusing to provide adequate responses to the Employer's questions. In that regard, the Employer's request for information is relevant to addressing the specific factual context underlying the Union's grievance and considering whether the Employer acted properly, under the Union Access provision of the contract and the parties' past practice, in curtailing the Union's September 8th visitation. And, while the form of these questions may seem to solicit evidentiary admissions, their overarching purpose nevertheless is narrowing the scope of the issues for litigation, a completely lawful objective under Sections 8(a)(5) and 8(b)(3).

The duty to bargain in good faith under Section 8(d) of the Act includes an obligation to process grievances and, as with all aspects of collective bargaining, grievance processing necessarily involves a "give and take" between the parties in order to arrive at a negotiated conclusion. These negotiations may well serve to narrow the scope of the grievance and ultimately may lead to the resolution of the grievance short of an arbitration.[3] In order to reach a grievance settlement, good faith sharing of relevant information between the parties is critical.[4] Thus, the obligation to provide information is a necessary adjunct to processing grievances and complying with the parties' obligation to bargain in good faith under Section 8(d) of the Act.

It is well settled that a Union has a statutory duty to supply information parallel to that of an Employer.[5] A party is obligated to provide requested information that may prove relevant to contract negotiation and contract administration, including determinations of whether to file

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[3] NLRB v. Acme Industrial Co., 385 U.S. 432, 438 (1967), enforcing Acme Industrial Co., 150 NLRB 1463 (1965): "Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened."

[4] Id. at 436.

[5] Firemen & Oilers Local 288 (Diversy Wynandotte), 302 NLRB 1008, 1009 (1991); Service Employees Local 144 (Jamaica Hospital), 297 NLRB 1001, 1003 (1990); Teamsters Local 851 (Northern Air Freight), 283 NLRB 922, 925 (1987).

a grievance, and whether to proceed to arbitration.[6] The mere fact that a party has decided to seek arbitration does not extinguish a party's obligations under the NLRA to provide information potentially relevant to that dispute.[7] Rather, the Board has held that in addition to providing information to assist in the decision of whether or not to pursue arbitration, a party must provide requested information simply to help that other party prepare for an arbitration that is already pending.[8] Finally, the mere fact that a party asks questions that require a narrative response does not diminish the potential relevance of the requested information. Indeed, the Supreme Court and the Board have ordered parties to answer narrative questions in a variety of cases.[9]

Here, at the beginning of the grievance procedure, the Employer posed five questions to the Union in order to ascertain whether the Union would be controverting any of the Employer's stated reasons for denying the grievance and, if so, on what facts, witnesses, and documents the Union would be relying. We conclude such information is relevant to the grievance, because it serves the legitimate purpose of narrowing the scope of the grievance to the actual

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[6] Jamaica Hospital, 297 NLRB at 1002-03.

[7] See California Nurses Assn., 326 NLRB 1362, 1366 (1998).

[8] Jewish Federation Council, 306 NLRB 507, n.1 (1992). See also Fawcett Printing Corp., 201 NLRB 964, 972 (1973) (production required where information would "assist the parties in preparing the case for arbitration and thereby tend both to shorten the arbitration hearing and to make the evidence received at the hearing more complete"); Chesapeake and Potomac Telephone Co., 259 NLRB 225, 227 (1981) and cases cited therein.

[9] See NLRB v. Acme Industrial Co., 385 U.S. at 434 (subcontracting clause; questions related to the purpose of removing equipment from the plant); Ormet Aluminum Mill Products, 335 NLRB 788, 789 (2001) (subcontracting grievance; questions related to, among other things, the reasons for subcontracting); Cornerstone Masonary Constructors, LLC, 343 NLRB No. 106, slip op. at 2 (2004) (alter ego case; 77 questions, which required the respondent to describe the alleged alter ego businesses, their personnel and administrative characteristics, and their respective geographic locations); Gary's Electrical Service Co., 326 NLRB 1136, 1142 (1998) (same); Proctor Mechanical Corp., 279 NLRB 201, 203 (1986) (27 questions regarding a possible "double breasted" operation).

matters that the Union intended to put in controversy.[10] The Union failed to fully comply with its statutory obligations in processing this grievance because it declined to respond to two questions entirely[11] and has otherwise given only informal oral responses in negotiations,[12] rather than substantive responses the Employer requested. The Union was under a Section 8(d) duty to attempt to resolve this matter by narrowing the scope of this grievance, if possible, and by providing a factual predicate for its contentions. Its failure to provide a substantive response, either by answering the questions posed or by clarifying in some other format the nature of its grievance, obstructed both those goals. It thereby prevented meaningful discussion of the grievance, prior to the decision to arbitrate this matter, in violation of the Act.

Any Union objection to the form of the questions posed, or assertion that the grievance has now been appealed to arbitration, still does not excuse the Union from complying with its Section 8(d) obligations throughout the entire grievance processing procedure in the circumstances of this case. In Ormet Aluminum Mill Products, supra, at 788-790, the Board held that a series of questions posed by the union at the third step of the grievance procedure, prior to a demand for arbitration, must be answered under Section 8(a)(5). The questions concerned grievances filed over an alleged violation of a subcontracting clause and sought, among other things, the reasons that the employer had subcontracted the work. In dissent, then-Chairman Hurtgen labeled the queries "interrogatories," which he considered to be "a classic request for pretrial discovery," unenforceable under Section 8(a)(5). Hurtgen noted that the union was not asking for documents, but rather the reasons

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[10] See Jewish Federation Council, 306 NLRB at n.1; Fawcett Printing Corp., 201 NLRB at 972; and Chesapeake and Potomac Telephone Co., 259 NLRB at 227, and cases cited therein.

[11] The Union has not responded to: **September 10th question (2)**, regarding whether the Union must announce its purpose to the Employer during visit; and **September 22nd question 2**, regarding whether the Employer may maintain continuous visual contact with the Union representatives during visit.

[12] The Union has orally responded to: **September 10th question (1)**, i.e., Union asserts no advance notice is required prior to a Union visit; **September 10th question (3)**, i.e., Union not contending that it is exempt from complying with safety and sanitary requirements during visits; and **September 22nd question (1)**, i.e., the Union is not privileged to stop unit members from performing their duties during visit.

for respondent's actions, requiring the respondent "to create information in advance of arbitration." He suggested that statutory enforcement of these requests would "unduly clog the process," particularly where he perceived a party to "seek[] the information not to decide whether to go to arbitration but rather for use in arbitration."[13]

The dissent by Hurtgen relied on the Board's prior decision in California Nurses Assn. There, the employer asked the union to provided it with facts, documents, and witnesses regarding incidents assertedly caused by the employer's work redesign program, which the union alleged threatened patient safety and jeopardized nurse licensures.[14] The Board found that the union violated the Act by failing to turn over certain facts and documents, as well as the names of individuals on whom the union was relying in support of its grievance. However, it also affirmed the ALJ's conclusion that the union was not obligated to "define and explain its theories" or to isolate specific facts that it intended to use at the upcoming arbitration, in order to avoid intruding on the arbitrator's authority.[15] Thus, once a case is scheduled for arbitration, California Nurses Assn. creates a dichotomy between requests for legal theory and evidentiary information upon which a party intends to rely in the arbitration, not available under an information request under the Act, and factual material, documents, and witnesses that support the underlying grievance, which are enforceable under the Act.

For all the reasons noted above, we conclude that the questions here are more an attempt by the Employer to discern the nature of the grievance than any attempt to engage in unenforceable pre-arbitral discovery, which the Hurtgen dissent would consider illegitimate under California Nurses. No creation of information to assist the Employer during arbitration is involved in this case. While an argument can be made that the questions sought evidentiary admissions, i.e., facts the Union would either contest or admit, the responses nevertheless could have led to the possible resolution of the grievance. In these circumstances, the Union's failure to answer questions in some responsive format of its own choosing in order to narrow the scope of the grievance violates Section 8(b)(3) of the Act, since such responses would aid in preparation,

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[13] Ormet Aluminum Mill Products, supra, at 791.

[14] California Nurses Assn., supra, at 1365.

[15] Id. at 1367.

or even obviate the need, for the arbitration altogether.[16] We, therefore, conclude that complaint should issue in this matter, and note that the questions do not implicate the concerns set forth in then-Chairman Hurtgen's dissent in Ormet.

Finally, the Union failed to provide the Employer with the facts, documents, or names of individuals which will support its positions.[17] Thus, in addition to the violation regarding the Union's failure to answer some of the questions, we find the Union's failure to provide the underlying facts, documentation, and witnesses to the questions which it did orally answer, a failure almost identical to that found unlawful in California Nurses Assn., supra, also violates Section 8(b)(3) of the Act.

B.J.K.

[16] See California Nurses Assn., supra, at 1366 (information required "so that the parties to the grievance procedure have the opportunity to 'evaluate the merits of the claim' and work toward settlement"), quoting Firemen and Oilers Local 288 (Diversy Wyandotte), supra at 1008.

[17] While several Union representatives claimed to have entered the facility without advance notice on an unspecified number of occasions on unspecified dates, the Union has failed to identify witnesses or documents corroborating these facts. Nor has it asserted that no such witnesses or documents exist.